BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PHILOMENA M. WOHLFORD Claimant	)	
VS.	)	Docket No. 1,021,347
BOMBARDIER AEROSPACE/LEARJET Self-insured Respondent	)	

ORDER

Respondent requested review of the February 10, 2006, Award by Administrative Law Judge John D. Clark. The Board heard oral argument on June 16, 2006.

APPEARANCES

John L. Carmichael, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant suffered a single date of accident of February 5, 2003, and that all of claimant's physical problems are related to that accident; that claimant had a 20 percent impairment of function to the body as a whole; and that claimant was entitled to a work disability. The ALJ awarded claimant a 25.5 percent permanent partial disability based on a task loss of 25 percent and a wage loss of 26 percent. The ALJ found that claimant was entitled to her outstanding medical, unauthorized medical up to the statutory limit, and future medical upon proper application to the Director. The ALJ also found that respondent was entitled to a credit against the temporary total disability (TTD) benefits paid in the amount of $842 because the benefits were paid while claimant was drawing unemployment compensation.

Respondent requests the Board affirm the ALJ's finding that claimant's sole date of accident was February 5, 2003. Respondent also requests that the Board affirm the ALJ's finding that respondent was entitled to a $842 credit for TTD benefits paid while claimant was receiving unemployment benefits. Respondent, however, asserts that it should also be given a credit for TTD benefits paid during the 12-week period the claimant was receiving an amount from respondent equivalent to her wage as part of her severance package.

Respondent further requests that the Board modify the ALJ's award of 25.5 percent permanent partial disability. Respondent contends that the opinions of Dr. Chris Fevurly are more credible than those of Dr. Reiff Brown and that Dr. Fevurly's opinion concerning claimant's functional disability and task loss should be utilized in computing claimant's permanent partial disability. In the alternative, respondent requests that the Board give equal credence to the opinions of Drs. Fevurly and Brown. Respondent also asserts that claimant is not entitled to future medical treatment because she has suffered a worsening of her condition since returning to work at Learjet through her current employer, The Arnold Group.

Respondent contends that there is no evidence in the record regarding claimant's post-injury job search before she completed a job application with The Arnold Group on May 13, 2005. Accordingly, respondent requests that a post-accident wage equivalent to the wage claimant was receiving at respondent be imputed to claimant for the period from claimant's last day at respondent to May 13, 2005.[1] Respondent does not take issue with the ALJ's finding of a 26 percent wage loss after claimant began her employment with The Arnold Group and requests that the Board affirm that finding.

Claimant requests that the Board modify the ALJ's Award to eliminate the credit for $842 in TTD compensation. Claimant contends that she was released from the care of Dr. Paul Stein on April 28, 2005, and that TTD compensation payments would have been discontinued as of that date. After April 28, 2005, claimant drew two weeks of unemployment benefits before her employment with The Arnold Group. Consequently, claimant argues she did not receive both TTD compensation and unemployment compensation for that two-week period.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

[1] Various dates appear in the record and in the parties' briefs for claimant's last day worked for respondent, including: January 27, 2005; February 5, 2005; February 8, 2005; and "within a week or so of January 27, 2005." R.H. Trans. at 13.

Claimant was a quality analyst at respondent. On February 5, 2003, she fell while working. When she hit the floor, she was knocked unconscious for a short period of time. She dislocated her shoulder, broke her humerus bone, and suffered an injury to her neck. She was taken to the Health Services department, and the nurses tried to put her shoulder back in place but were unable to do so. She was sent to the hospital and saw Dr. Robert Eyster. He provided her with some exercises and also sent her for x-rays. Claimant returned to work the next Monday, February 10. When she returned to work, her arm was in a sling.

Claimant's symptoms did not improve. She went back to Health Services, who recommended an MRI. The MRI showed she had a torn rotator cuff, and she was then referred to Dr. James Gluck, who performed rotator cuff repair surgery in February 2004. Claimant began to notice that her fingers and hands were going numb, and she was sent to Dr. Paul Stein. He took x-rays and gave her upper epidural injections. She was released to return to work on May 3, 2004.

Claimant returned to her old job with restrictions from Dr. Gluck of limited lifting and limited overhead work. She was given a side panel for her computer keyboard. There was no bending, twisting of the neck or arm, or looking down at her accommodated job. Even with her restrictions, her symptoms worsened as she continued to work.

Claimant was laid off from respondent as part of a reduction in force in February 2005. At the time, she had not been released from treatment by Dr. Stein, but he released her in April 2005. After she was laid off from respondent, she was paid the equivalent of 12 weeks pay, which she received in 6 installments every 2 weeks for 12 weeks. At the end of this 12-week period, she received 2 weeks of unemployment compensation before she started working for The Arnold Group in May 2005, a company that provides temporary workers to businesses. Claimant now works at respondent as a temporary worker through The Arnold Group. She works 40 hours per week plus 10 to 15 hours overtime and works on a computer most of the time. No one from The Arnold Group supervises her work. She reports to a supervisor at respondent.

Claimant filled out the application for employment at The Arnold Group on May 13, 2005. She did not fill out any form from The Arnold Group that asked anything about her physical condition. No one from The Arnold Group asked her anything about her workers compensation claim. She testified that she did not tell The Arnold Group about her restrictions because she had been asked by Joni Holding, the human resources representative at respondent, to submit an application because respondent wanted to hire her for employment through The Arnold Group. She knew that respondent was aware of her restrictions.

Claimant's first day of work as a temporary employee at respondent through The Arnold Group was May 23, 2005. She has had a flare-up of her condition because of the constant typing she is now doing. Claimant said she currently wakes up feeling well, but

as the day progresses, the numbness comes into her fingers and her shoulder and neck hurts. She has continuous pain in her shoulder and neck caused by constant computer work. Because her shoulder was not getting better, the fingers continued to tingle, and her neck kept hurting, she returned to Health Services in June 2005. She was referred to Dr. Hughes, who recommended physical therapy. Respondent, however, did not treat Dr. Hughes' services as authorized. At the time of the Regular Hearing, claimant was not receiving any medical treatment.

Claimant testified that there has been no occasion since her employment with The Arnold Group that she has been asked to do something she felt was outside her restrictions or that she told anyone she could not do. Her current job at respondent is within her restrictions, although she feels she is overdoing it and needs to get up and take breaks.

Madonna Buresh is a human resources consultant with The Arnold Group. Ms. Buresh testified that claimant is an associate employee. Claimant was interviewed by Marilyn Murphy, a staffing specialist for The Arnold Group. Ms. Buresh testified that Ms. Murphy did not recall that any discussion of claimant's restrictions came up in the interview. Potential associate employees are never asked about workers compensation matters during the interview. Nor are they asked about restrictions. If a potential employee volunteers information about restrictions, that information is put into the system, and clients are advised of the restriction. If an employee of The Arnold Group is hurt at work for a client, he or she is to report the injury to The Arnold Group and will be sent to its preferred provider.

Dr. Paul Stein, a board certified neurosurgeon, first saw claimant on January 14, 2005, and treated her through April 28, 2005, when he released her as having reached maximum medical improvement (MMI). Claimant was referred to him by respondent. Claimant had discomfort in the right side of the neck intermittently. She had developed some numbness and tingling in the right hand, predominantly in the thumb. Holding her head a certain way would cause some tingling in the arm.

Dr. Stein reviewed x-rays and conducted a physical examination. In doing so, he said that claimant had a mild slippage at the junction between the cervical spine and the thoracic spine, C7-T1, and degenerative disk disease throughout her cervical spine and at the C7-T1 level. He recommended testing and steroid injections to the cervical spine. The epidural injections were not helpful.

In March 2005, claimant was complaining of numbness in both hands. Dr. Stein recommended more testing. In April 2005, a cervical myelogram with a CT scan was performed to be sure she did not have a compression of her spinal cord. The testing showed there was adequate room for the spinal cord. There was some narrowing of the foramina which could be irritating the nerve and causing some right arm numbness. Dr. Stein believed that the narrowing of the foramina was from degenerative disease but that

the degenerative changes in claimant's neck were probably aggravated by the fall. He suspected that the tingling in claimant's right arm was related to the cervical pathology. Dr. Stein did not recommend surgery.

Using on the AMA *Guides*,[2] Dr. Stein believed that claimant was in the diagnosis related estimate (DRE) Cervicothoracic Category II and provided her a 5 percent whole person impairment. He recommended permanent restrictions of avoiding repetitive overhead work and activity that required repetitive bending or twisting of the neck. As claimant was referred to Dr. Stein to deal with her cervical spine, he did not evaluate her rotator cuff injury. Therefore, he did not give a functional impairment rating in relation to claimant's right upper extremity. His restrictions were based only on claimant's cervical injury, and he did not recommend or take into account any restrictions with respect to her shoulder.

Dr. Stein reviewed the task list of Dan Zumalt. He opined that claimant was unable to perform 1 of the 14 tasks listed, for a 7 percent task loss.

Dr. Reiff Brown, who is board certified in orthopedic surgery, evaluated claimant at the request of her attorney on May 10, 2005. Dr. Brown took claimant's history, reviewed her medical records, and performed a physical examination. He concluded that claimant suffered a fracture dislocation of the right shoulder, as well as a complete rotator cuff tear, in her fall of February 5, 2003. He also concluded that she suffered an aggravation of preexisting degenerative arthritic changes in the cervical spine. He believed that although she has some radicular symptoms, they were not severe enough to qualify as a cervical radicular syndrome. Dr. Brown felt claimant was at MMI but agreed with Dr. Stein that she may need further treatment if her cervical symptoms increase.

Using the AMA *Guides*, Dr. Brown opined that claimant fell within the DRE Cervicothoracic Category II with a 5 percent whole body impairment based on aggravation of preexisting degenerative changes and intermittent radiculopathy. He also rated claimant as having a 7 percent right upper extremity impairment based on loss of range of motion and a 12 percent impairment of the right upper extremity on the basis of moderate crepitus as noted in Table 19 on Page 59 of the AMA *Guides*. He found that she has an additional 10 percent impairment of the right upper extremity on the basis of weakness of abductor function as calculated from the Formula and Table 34 on Page 65 of the *Guides*. Those rating combined and converted to a 20 percent permanent partial impairment of function of the body as a whole. Dr. Brown recommended that claimant

> . . . permanently avoid work that involves frequent flexion and extension or rotation of the cervical spine. She should also avoid work that involves frequent use of the

[2]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> right hand above shoulder level or for reach with the right hand away from the body more than 18 inches. She should not lift more than 20 pounds occasionally, 10 pounds frequently utilizing both arms.[3]

Dr. Brown reviewed the task list compiled by Jerry Hardin and testified that he concurred with Mr. Hardin's conclusions concerning the tasks that are within and the tasks that are outside the restrictions that Dr. Brown imposed on claimant. Of the 22 nonduplicated tasks, Dr. Brown opined that claimant is unable to perform 5, for a 23 percent task loss. Dr. Brown also reviewed the task list prepared by Dan Zumalt. Of the 14 nonduplicated tasks, Dr. Brown opined that claimant is unable to perform 2, for a 14 percent task loss.

Dr. Chris Fevurly is board certified in internal medicine and occupational medicine. He examined claimant at the request of respondent on August 12, 2005. Based on her history and his examination, he found that as a result of the work related accident, claimant suffered a displaced fracture of the right proximal humerus and a complete rotator cuff tear and a partial subluxation of the right shoulder. He opined that she may have had a partial injury to the axillary nerve. He also found that claimant had degenerative spondylosis in the cervical spine which was asymptomatic before her fall and was aggravated by the fall. She also had degenerative changes in the shoulder that were affected by the fracture and rotator cuff tear.

Dr. Fevurly found that claimant had weakness in her right shoulder either as a result of pain or an axillary nerve contusion. She could elevate the arm to 160 degrees with active abduction, and she has some give-way with testing of the strength of the right shoulder. He measured loss of strength by calculating it against gravity and against resistance. He could not say how much claimant was able to lift with the right versus the left. He said those measurements are done in a functional capacity evaluation. However, Dr. Fevurly did test claimant's grip strength and found it was less in the right than in the left.

Dr. Fevurly was asked to compare his physical testing of claimant to that of Dr. Brown. Dr. Brown's report indicates that strength testing on claimant was done using a muscle testing ergometer. With four tries, claimant averaged 7.35 pounds lifting ability with the left arm and 4.43 pounds with the right. Dr. Fevurly was not familiar with that type of testing and stated: "He must be doing some type of isokinetic test where he could actually use a scale to measure how much you can forcefully pull isokinetically. I'm not–I can't say I've seen that done anywhere."[4]

Dr. Fevurly rated the loss of strength in claimant's arm as an axillary nerve Grade 4 and assigned 4 percent impairment to the arm based on Table 12 on Page 49 multiplied

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[3]Brown Depo., Ex. 1 at 6.

[4]Fevurly Depo. at 36-37.

by the overall value for the axillary nerve on Table 15, page 54. Dr. Brown assigned a 10 percent impairment of the right upper extremity on the basis of weakness of abductor function as calculated from the formula in Table 34, page 65. Dr. Fevurly stated that Table 34, page 65, applies to grip strength, not abductor strength. Dr. Fevurly said Dr. Brown was wrong in using Table 34.

Dr. Fevurly obtained a greater range of motion on testing than did Dr. Brown. Those differences could represent a difference in her abilities on a given day. Dr. Fevurly found claimant had a 2 percent impairment of function to the right upper extremity based on loss of range of motion, whereas Dr. Brown found claimant had a 7 percent impairment of function.

Dr. Brown found that claimant had moderate crepitus, whereas Dr. Fevurly found claimant had a mild degree of crepitation. Dr. Fevurly thought the crepitation was mild was because he compared the noise between claimant's two shoulders and thought they were pretty much the same.

Using the AMA *Guides*, Dr. Fevurly rated claimant with a 12 percent upper extremity impairment. He also rated her cervical spine with a 5 percent whole person impairment. Combining these rating gave claimant a 13 percent whole person impairment.

Dr. Fevurly recommended that claimant permanently avoid prolonged or repetitive overhead reaching or forceful overhead use of the right arm and prolonged overhead looking. She should lift no more than 60 pounds, no more than 50 pounds on an occasional basis, and no lifting greater than 30 pounds to chest level on more than a frequent basis. He did not think claimant would need any future medical treatment.

Dr. Fevurly agreed with some of Dr. Brown's restrictions. Dr. Fevurly did not think claimant would have a problem with frequent flexion, extension or rotation, as long as it was not prolonged or nonstop. In regard to Dr. Brown's restriction against working beyond 18 inches, Dr. Fevurly again said he would not restrict that unless it were constant reaching forward with her right arm. The biggest difference between the restrictions of Drs. Brown and Fevurly is their lifting restrictions.

Dr. Fevurly reviewed the task loss list prepared by Dan Zumalt. Of the 14 nonduplicated tasks on the list, Dr. Fevurly opined that claimant was unable to perform 1, for a 7 percent task loss. Dr. Fevurly reviewed the task list prepared by Mr. Hardin and opined that of the 22 nonduplicated tasks, claimant was unable to perform 3, for a 14 percent task loss.

In Dr. Fevurly's report, he indicated that after claimant had gone back to work for The Arnold Group, she had a recurrence of her right neck and shoulder complaints. He agreed that his report does not indicate that her neck and shoulder complaints had ever resolved and thought "reaggravation" might have been a better word. Dr. Fevurly agreed

that claimant did not have a resolution of her complaints but rather when she went back to work, the complaints flared up again.

Jerry Hardin, a human resource consultant, met with claimant at the request of her attorney on June 6, 2005. He compiled a list of tasks claimant had performed in the 15 years before her work-related accident. He supplemented his report of June 6, 2005, on September 25, 2005, to add the restrictions of Dr. Fevurly. Mr. Hardin did not determine what claimant could be expected to earn in the open labor market if she were to lose her position at respondent through The Arnold Group.

Dan Zumalt, a vocational rehabilitation consultant, met with claimant on September 6, 2005, at the request of respondent. During that meeting, he compiled a list of her tasks performed in the 15-year-period before her work-related accident. There were 14 nonduplicated tasks on that list. Mr. Zumalt likewise did not offer an opinion as to claimant's ability to earn comparable wages, since she was working for The Arnold Group when he visited with her. As such, there is no expert opinion testimony or any other evidence as to claimant's ability to earn wages in the open labor market post injury, apart from what she has actually earned working at Learjet while employed by respondent and while employed by The Arnold Group.

The Board agrees with the ALJ that the expert medical opinions of Dr. Brown are the more credible. Accordingly, the Board affirms the ALJ's finding of a 20 percent impairment of function based upon the rating given by Dr. Brown. However, the Board finds that Dr. Brown's task loss opinion using the task list prepared by Mr. Hardin was 23 percent, not 25 percent. In addition, the Board finds no reason to give greater weight to Mr. Hardin's task list than to the task list prepared by Mr. Zumalt. Dr. Brown opined that claimant had lost the ability to perform 14 percent of the tasks on Mr. Zumalt's list. Averaging these two task loss opinions results in a 18.5 percent task loss. When averaged with the 26 percent wage loss, claimant's work disability is 22 percent beginning when she began working at The Arnold Group.

Between April 28, 2005, when she was released by Dr. Stein until approximately May 13, 2005, when she went to work for The Arnold Group, claimant was unemployed and, therefore, had a 100 percent actual wage loss. However, claimant failed to prove that she made a good faith job search during this period. Accordingly, a wage should be imputed.[5] The best evidence of claimant's post-accident ability to earn wages in the open labor market is the wage claimant received when she went to work at The Arnold Group. The Board will impute that wage to claimant beginning April 29, 2005, making her wage loss 26 percent and her work disability 22 percent as of April 29, 2005.

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[5]See *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Board agrees with and affirms the decision by the ALJ to deny respondent's request for an offset of monies paid claimant pursuant to the severance agreement. Respondent argues claimant received the equivalent of 12 weeks of wages but was not required to work those 12 weeks. Respondent contends there were no wages that needed to be replaced for those 12 weeks. The Board concludes the monies should not be treated as unearned wages. The severance money was paid for business reasons including, according to the agreement, claimant's release of any claims against respondent. Absent express statutory mandate to the contrary, the employer is not entitled to credit for payments to claimant under a legal obligation outside the Workers Compensation Act.[6]

However, the Board disagrees with the ALJ's decision to grant respondent a credit for two weeks of temporary total disability compensation. Claimant was unemployed and not receiving temporary total disability for two weeks after being released by Dr. Stein and before going to work for The Arnold Group. Accordingly, there were no overlapping weeks or duplication of temporary total disability and unemployment compensation payments.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated February 10, 2006, is modified as follows:

The claimant is entitled to 21.28 weeks of temporary total disability compensation at the rate of $432 per week or $9,192.96, followed by 81.74 weeks of permanent partial disability compensation at the rate of $432 per week or $35,311.68 for a 20 percent functional disability, followed by 8.18 weeks of permanent partial disability compensation at the rate of $432 per week or $3,533.76 for a 22 percent work disability, making a total award of $48,038.40.

As of June 29, 2006, there would be due and owing to the claimant 21.28 weeks of temporary total disability compensation at the rate of $432 per week in the sum of $9,192.96, plus 89.92 weeks of permanent partial disability compensation at the rate of $432 per week in the sum of $38,845.44, for a total due and owing of $48,038.40, which is ordered paid in one lump sum less amounts previously paid.

The Board finds that respondent is not entitled to a credit for the 12-week period that claimant was paid as part of her severance package with respondent, nor is it entitled to a two-week credit for payment of temporary total disability compensation before claimant was released to return to work by Dr. Stein.

The Board adopts the other orders of the ALJ to the extent they are not inconsistent with the above.

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[6] *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director